

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HEY'S ENTERPRISES, INC.	:	ORDER
	:	DTA NO. 818890
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 1994 through February 28, 1997.	:	

Petitioner, Hey's Enterprises, Inc., 4608 County Road #1, Canandaigua, New York 14424, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1994 through February 28, 1997.

On February 6, 2002, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4), allowing the parties until March 8, 2002 to respond to the proposed dismissal of the matter, which date began the 90-day period for the issuance of this order. The Division of Taxation, appearing by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel), submitted the affidavits of John E. Matthews, Carl DeCesare and Daniel LaFar with attachments, in response to the notice. Petitioner, appearing by Eldredge, Fox & Porretti, LLP (Thomas A. Walter, CPA) submitted a statement of facts with attachments and the affidavit of Thomas A. Walter, in response to the notice.

Upon review of the pleadings, the Notice of Intent to Dismiss Petition, the affidavits and other documents submitted in response to the notice, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

1. Petitioner, Hey's Enterprises, Inc., filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") seeking a review of a Notice of Determination, notice number L-017225725, and a conference was held on November 15, 2000. Petitioner appeared by Thomas A. Walter, CPA.

2. Following the conference, BCMS issued a Conciliation Order (CMS No. 178694), dated July 13, 2001, denying petitioner's request and sustaining a Notice of Determination dated November 29, 1999.

3. On January 31, 2002, the Division of Tax Appeals received the petition of Hey's Enterprises, Inc. seeking a revision of the determination which was sustained by the conciliation order. The envelope bearing the petition was sent by United States Postal Service ("USPS") First Class Certified Mail and bore a machine-metered stamp of January 29, 2002. Petitioner's address on the petition is listed as 4608 County Road #1, Canandaigua, New York 14424. The petition was signed by Mr. Walter and is dated October 2, 2001. In the cover letter that accompanied the petition, Mr. Walter wrote, in pertinent part, as follows:

Eldredge, Fox & Porretti, LLC mailed the attached petition (form TA-10) via certified mail on October 2, 2001 on behalf of Hey's Enterprises, Inc.

As of date, we has [sic] not received a return receipt for the mailed petition. Upon calling the Division of Tax Appeals, it was determined the mailed petition had not been received.

At this time, we are re-submitting the petition along with the attached proof of mailing.

As proof of mailing of the petition, petitioner enclosed copies of the front of a PS Form 3800 U.S. Postal Service certified mail sender's receipt ("sender's receipt") and the face page of an envelope. The imprinted certified number "7099 3400 0002 3510 0537" runs vertically up the left edge of the sender's receipt. The handwritten name "DIVISION OF TAX APPEALS" appears in the box labeled "Article Sent To" located near the top of the sender's receipt. The middle of the sender's receipt is divided into two spaces. The left-hand space contains separate sequential boxes labeled: "Postage," "Certified Fee," "Return Receipt Fee (Endorsement Required)," "Restricted Delivery Fee (Endorsement Required)," and "Total Postage & Fees." The following amounts appear in the postage, certified fee, return receipt fee and total postage and fees boxes: \$.57, \$1.90, \$1.50 and \$3.97, respectively. In the middle right-hand space labeled "Postmark Here," the handwritten date "10-2-01" appears. The lower part of the sender's receipt has separate sequential boxes labeled: "Name (Please Print Clearly) (to be completed by mailer)," "Street, Apt. No.; or PO Box No.," and "City, State, ZIP+4." The handwritten name of the sender "HEY'S ENTERPRISES" appears in the name box. The remaining address boxes do not contain any entries. The copy of the face page of an envelope, addressed to the "SUPERVISING ADMINISTRATIVE LAW JUDGE, DIVISION OF TAX APPEALS," contains the words "CERTIFIED MAIL," a bar code and corresponding certified number "7099 3400 0002 3510 0537" and bears a machine-metered stamp date of "OCT 2 '01."¹ The return address on the envelope is listed as "Eldredge, Fox & Porretti, LLP, Certified Public Accountants, 25 North Street, Canandaigua, NY 14424." A power of attorney did not accompany the petition.

¹ The date on the machine-metered stamp is barely readable because it is so faint. The fee amount is totally illegible.

4. On February 6, 2002, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner for failure to file a timely petition. The notice stated that the petition was not filed until January 29, 2002, or 200 days after the issuance of the Conciliation Order dated July 13, 2001. The cover letter which accompanied the Notice of Intent to Dismiss Petition explained that the notice was not sent to petitioner's representative because a power of attorney was not filed with the Division of Tax Appeals. Following the issuance of the Notice of Intent to Dismiss Petition, the parties were given 30 days to respond.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted the affidavits of Carl DeCesare and Daniel LaFar, employees of the Division. The Division also submitted a copy of the certified mail record ("CMR") containing a list of the conciliation orders allegedly issued by the Division on July 13, 2001 (including the orders issued to petitioner and its representative); a copy of the Conciliation Order; and a copy of petitioner's petition and its attachments.

6. The affidavit of Carl DeCesare, Assistant Supervisor of Tax Conferences in BCMS, sets forth the Division's general procedures for preparing and mailing out conciliation orders. All conciliation orders mailed within the United States are sent by certified mail. Based on information supplied by BCMS, the Data Management Services Unit prepares the conciliation orders, cover letters and the CMR, which is a listing of taxpayers to whom conciliation orders are sent by certified mail on a particular day. The Data Management Services Unit forwards the conciliation orders and the cover letters to the conciliation conferee for signature who in turn forwards the order and the cover letter to a clerk in the BCMS assigned to process conciliation orders. The Data Management Services Unit forwards the CMR to this same clerk for

processing. The clerk, as part of her regular duties, verifies the requester's names and addresses. She then folds and places the cover letters and conciliation orders into envelopes. The USPS changed its procedures for the mailing of pieces of certified mail on July 13, 2001, requiring the use of new bar code certified mail numbers containing 20 digits. Due to the USPS's new certified mail procedures, the clerk in BCMS manually attaches the sticker from the USPS PS Form 3800, to the envelope and cuts the certified mail number from the certified mail receipt and attaches it to the center of the certified mail log. Prior to the USPS changes in certified mail procedures, the certified control number was assigned by an internal computer application which stored a block of certified control numbers (beginning with the letter P followed by nine digits) and assigned the certified control numbers to the Conciliation Order cover letter and also on the CMR.

For conciliation orders being mailed on July 13, 2001, the old certified mail numbers (beginning with the letter P followed by nine digits) were being generated and assigned by the computer and still appeared on the Conciliation Order cover letter and in the left hand corner of the CMR even though the USPS procedures had changed and the new 20-digit bar code certified mail numbers were affixed to the envelopes and to the center of the certified mail log. In this case certified number 7000 1530 0005 5513 4764 was used for the Conciliation Order mailed to Hey's Enterprises, Inc. and certified number 7000 1530 0005 5513 4771 was used for the copy mailed to Thomas A. Walter, CPA, petitioner's representative. The conciliation orders with cover letters and the CMR are then picked up in BCMS by an employee of the Division's Mail Processing Center.

7. Each page of the CMR is a separate and individual certified mail record for the conciliation orders listed on that page only and each page contains a space to record the "Total

Number of Pieces Listed by Sender” and “Total Number of Pieces Received at Post Office” for conciliation orders listed on that page only. There is also a space on each individual CMR for the receiving postal employee to affix his or her signature.

8. The four-page CMR contains a list of conciliation orders allegedly issued by the Division on July 13, 2001. The certified control numbers on the CMR do not run sequentially. All names and addresses listed on the certified mail record have been redacted except the entries for petitioner and its representative, Thomas A. Walter, CPA. Their names and addresses appear on page one of the certified mail record with the certified mail number 7000 1530 0005 5513 4764 appearing next to the name Hey’s Enterprises, Inc., 4608 County RD#1, Canandaigua, New York 14424-9616, and the certified mail number 7000 1530 0005 5513 4771 appearing next to the name Thomas A. Walter, CPA, Eldredge, Fox, Porretti & Morga, 25 North Street, Canandaigua, New York 14424. Each page of the CMR is date-stamped July 13, 2001 by the Colonie Center branch of the USPS in Albany, New York and each page contains a Postal Service employee’s initials verifying receipt as well. At the bottom of page one, the page on which petitioner and its representative’s names and certified control numbers are listed, the number “7” has been filled in as the “Total Number of Pieces Listed by Sender” and the number “7” has also been filled in as the “Total Number of Pieces Received at Post Office,” indicating no deletions from the CMR.

Attached to Mr. DeCesare’s affidavit as Exhibit “B” is a copy of the Conciliation Order, CMS No. 178694, dated July 13, 2001, which sustained the Notice of Determination.

9. The Division’s Mail Processing Center returned a copy of the CMR to BCMS with a postmark affixed to show the date of mailing. The CMR is kept in BCMS as a permanent record. These procedures were the normal and regular procedures of BCMS on July 13, 2001.

10. The affidavit of Daniel LaFar, Principal Mail and Supply Clerk in the Division's Mail Processing Center attests to the regular procedures followed by the mailroom staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. After a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk counts the envelopes and verifies the names and certified mail numbers against the information contained on the mail record.

An employee of the mailroom then delivers the envelopes and the CMR to the Colonie Center branch of the USPS in Albany. A postal employee affixes a postmark and his initials or signature to the certified mail record, indicating receipt by the Postal Service. In this case, the postal employee affixed a postmark to the certified mail record, wrote the number of pieces, and signed his initials on the CMR to indicate that this was the total number of pieces received at the post office. Mr. LaFar's knowledge that the postal employee wrote the "total number of pieces" for the purpose of indicating that seven pieces were received at the post office is based on the fact that the Division's Mail Processing Center specifically requested that postal employees either circle the number of pieces received or indicate the total number of pieces received by writing the number received on the mail record.

In the ordinary course of business and pursuant to the practices and procedures of the Mail Processing Center, the CMR is picked up at the post office the following day and is delivered to the originating office, in this case BCMS, by a member of Mr. LaFar's staff.

SUMMARY OF PETITIONER'S POSITION

11. In response to the issuance of the Notice of Intent to Dismiss Petition, petitioner's representative submitted a statement of facts, copies of the sender's receipt and the face page of

the envelope previously submitted with the petition on January 29, 2002, a copy of the transmittal letter that accompanied the petition submitted on January 29, 2002, and the affidavit of Thomas A. Walter, CPA. In the statement of facts, Mr. Walter states that petitioner does not dispute that the Conciliation Order was mailed to petitioner on July 13, 2001. However, he claims that the petition filed with the Division of Tax Appeals on January 29, 2002 is a replacement for an original timely-filed petition that was never received by the Division of Tax Appeals. Mr. Walter states that the copies of the original envelope and certified mail sender's receipt establish that the original petition was timely mailed by certified mail on October 2, 2001, prior to the expiration of the 90 days. He claims that additional proof of timely mailing is set forth in the affidavit of Thomas A. Walter wherein Mr. Walter states that, on October 2, 2001, he personally metered and mailed the original copy of petitioner's petition to the Division of Tax Appeals. Petitioner requests that the Notice of Intent to Dismiss Petition be dismissed and that the petition be considered valid.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 1138(a)(1),² petitioner had 90 days from the mailing of the Notice of Determination to file a petition with the Division of Tax Appeals. Petitioner also had the option, pursuant to Tax Law § 170(3-a)(a), to file a request for conciliation conference with BCMS. Petitioner chose the latter option in this case, and a conciliation order dated July 13, 2001 was issued. A conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days from the date of the issuance of the conciliation order (Tax Law § 170[3-a][e]). A conciliation order is "issued" within the meaning

² Tax Law § 1138(a)(1) has been amended and applies to taxable years commencing on or after January 1, 1997. Such amendments did not affect the 90-day requirement.

of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Trans County Constr.*, Tax Appeals Tribunal, August 24, 1995; *Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

B. Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

The affidavits of two Division employees, Carl DeCesare and Daniel LaFar, provide adequate proof of the Division's standard mailing procedure for the mailing of conciliation orders by certified mail. The affidavits generally describe the various stages of producing and mailing conciliation orders, and, in addition, attest to the authenticity and accuracy of the copies of the conciliation order and the certified mail record submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the DeCesare and LaFar affidavits were followed with respect to the Conciliation Order issued to petitioner. Petitioner's name and address appears on page one of the certified mail record which bears a USPS date stamp of July 13, 2001 along with the initials of a Postal Service employee. There

are seven certified mail control numbers listed on page one, and the USPS employee indicated that he received seven items for mailing. The same evidence establishes that a copy of the Conciliation Order was mailed to Thomas A. Walter, CPA, on the same date. Mr. Walter represented petitioner at the BCMS conference and, therefore, was appropriately mailed a copy of the Conciliation Order. The Division has, therefore, established that it mailed the Conciliation Order to petitioner and Mr. Walter by certified mail on July 13, 2001.

C. 20 NYCRR 3000.22(a)(2) provides in part as follows:

Mailing requirements. Any document required to be filed under this Part will not be considered to be timely mailed or timely filed unless the document is mailed in accordance with the following requirements:

(i) The document must be contained in an envelope or other appropriate wrapper and properly addressed to: State of New York Division of Tax Appeals or Tax Appeals Tribunal, Riverfront Professional Tower, 500 Federal Street, Troy, NY 12180.

(ii) The envelope containing the document must be deposited in the mail of the United States within the prescribed period or on or before the prescribed date with sufficient postage prepaid. For this purpose, such document is considered to be deposited in the mail of the United States when it is deposited with the domestic mail service of the United States Postal Service. . . .

(iii) The envelope or other wrapper containing the document must bear a date stamped by the United States Postal Service which is within the prescribed period or on or before the prescribed date of filing (including any extension of time granted for filing such document). If the postmark stamped by the United States Postal Service on the envelope or wrapper containing the document does not bear a date which falls within the prescribed date or on or before the prescribed date for filing such document in accordance with article 40 of the Tax Law, the document will be considered not to be timely filed, regardless of when the envelope or wrapper containing such document is deposited in the mail. Accordingly, the sender assumes the risk that the envelope containing the document will bear a postmark date stamped by the United States Postal Service within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing such document), but see subdivision (c) of this section with respect to the use of registered mail or certified mail to avoid this risk. . . .

20 NYCRR 3000.22(c) provides as follows:

Registered and certified mailing. (1) If an envelope or wrapper containing a document is sent by United States registered mail, the date of such registration is treated as the postmark date and the date of filing.

(2) If an envelope or wrapper containing a document is sent by United States certified mail and the sender's receipt is postmarked by the postal employee to whom such envelope is presented, the date of the postmark on such receipt is treated as the postmark date of the document and the date of filing.

D. As set forth in Conclusion of Law "A", petitioner had 90 days from the date of issuance of the Conciliation Order within which to file a petition for a hearing. The 90th day after July 13, 2001 was October 11, 2001. Petitioner's petition was sent by United States First Class Certified Mail to the Division of Tax Appeals on January 29, 2002 (received on January 31, 2002) and thus, was deemed filed on January 29, 2002 (*see*, 20 NYCRR 3000.22[a]) or 200 days beyond the 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Petitioner asserts that the petition which is the subject of the Notice of Intent to Dismiss Petition is merely a replacement petition. It claims that a timely petition was sent by certified mail to the Division of Tax Appeals on petitioner's behalf by its representative, Mr. Walter. In support of its claim that a petition was sent to the Division of Tax Appeals on October 2, 2001, petitioner submitted a copy of the face page of an envelope addressed to the Supervising Administrative Law Judge, bearing a bar code certified control number 7099 3400 0002 3510 0537 and a machine-metered stamp date of October 2, 2001; a copy of the certified mail sender's receipt bearing certified control number 7099 3400 0002 3510 0537 and the hand-affixed date of October 2, 2001; and the affidavit of Thomas Walter. Petitioner's evidence fails to establish that the petition was mailed on October 2, 2001. There is no USPS postmark on the certified mail sender's receipt. Rather, there is only the hand-affixed date of October 2, 2001. As noted, 20 NYCRR 3000.22(c)(2) expressly requires a postmarked United States certified mail sender's receipt to establish the date

of mailing. Accordingly, petitioner has failed to prove that a petition was sent to the Division of Tax Appeals within 90-days of the issuance of the Conciliation Order on July 13, 2001.

Since the petition was not timely filed, the Division of Tax Appeals lacks jurisdiction to review it (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. The petition of Hey's Enterprises, Inc. is dismissed with prejudice.

DATED: Troy, New York
June 6, 2002

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE